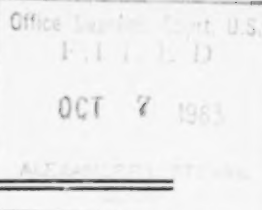


83-418  
No. 82-418



In The  
**Supreme Court of the United States**

October Term, 1983

—○—  
DORIS AFFELDT, et al.,

*Petitioners,*

vs.

J. C. PENNEY COMPANY, INC.,

*Respondent.*

—○—  
**BRIEF IN OPPOSITION TO  
PETITION FOR WRIT OF CERTIORARI**

—○—  
DYKHOUSE & WISE, P.C.

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## QUESTIONS PRESENTED

1. Whether a plaintiff can prevail on the basis of general allegations of a discriminatory pattern or practice of discrimination by her employer in the absence of credible evidence of individual discriminatory treatment.

2. Whether the District Court properly exercised its discretion in denying class certification to Petitioner who merely alleged an across-the-board pattern and practice of discrimination and failed to satisfy the specific legal prerequisites of F. R. Civ. P. 23(a).

3. Whether the unreasonable, meritless and vexatious conduct of Petitioner in connection with this appeal constitutes bad faith and a basis for awarding attorney's fees and costs to Respondent.

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**BRIEF IN OPPOSITION TO  
PETITION FOR WRIT OF CERTIORARI**

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**COUNTER STATEMENT OF THE CASE**

Respondent does not take issue with Petitioner's Jurisdictional Statement or Statutory Provisions Involved. However, Petitioner's Statement of the Case is unacceptable and constitutes a complete mischaracterization of the nature of Petitioner's claim, the course of the litigation and the uncontroverted facts at trial.<sup>1</sup> Respondent draws

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<sup>1</sup>For example, Petitioner misquotes the District Court's comments about her statistics in connection with class certification. Compare Petition P. 5 and Memorandum Opinion of March 16, 1979, PP. 2-3 (Petition A21-22).

the Court's attention to the various documents included within Petitioner's Appendix, as well as the Appendix herein.

While Respondent takes exception to substantially all of Petitioner's Statement of the Case, several clarifications are particularly appropriate and necessary. Further clarification of fact can be delineated from the Magistrate's Report and Recommendation and the Court of Appeals' Order. See Petitioner's Appendix. Most important are the circumstances of Petitioner's employment, largely ignored in the Petition.

Basically, this case involves a claim by a white female former employee of Respondent. Petitioner's basic claim resulted from Respondent's refusal to promote or transfer her from a position which she specifically sought at the time of hire. At trial, there was no evidence that she was qualified for any other position and, more importantly, that any other position was available. Moreover, at trial there was overwhelming evidence that Petitioner was a problem employee throughout her employment. Within approximately one year of being hired, Petitioner quit her job and filed suit complaining of Respondent's allegedly discriminatory hiring and transfer practices. Fundamentally, this case constitutes the abuse of the judicial system by a disgruntled former employee and nothing more.

A cornerstone of Petitioner's argument is the District Court's refusal to look at her statistical evidence. This repeated assertion of the Petitioner is simply not true. At every stage of the litigation, including Petitioner's routine requests for class certification, during the course of the Magistrate's hearing and upon the District Court's review of the Magistrate's Report and Recommendation,

the purported statistical evidence of the Petitioner was examined and considered. In fact, the purported statistical evidence of the Petitioner demonstrated the frivolousness of her claim. Women were transferred and promoted in significant numbers and into positions of substantial responsibility. As the Magistrate observed:

Even the Exhibits and statistics relied on by Plaintiff reflecting transfers or promotions demonstrate that women have been transferred or promoted in greater numbers than men. Petition A13.

Moreover, Petitioner ignores a basic deficiency at trial. Petitioner at no time presented any evidence of damage. While no order bifurcating liability and damages was entered, Petitioner proceeded through trial without offering any proof of damages. Magistrate's Report and Recommendation, Petition A15. As one might expect, Petitioner conveniently ignores this lapse.

Significantly, Petitioner fails to disclose the existence of a companion class action pending simultaneous with the instant case. Even before the filing of this class action in September of 1977, Petitioner filed another class action in November of 1976 claiming constructive discharge because of her defense of blacks and seeking to represent black employees as a class. See Appendix B. In the instant case, in addition to her purported interest in female employees, Petitioner also sought to represent a class composed of black applicants and employees of Respondent. See Appendix A. As with the instant case, the District Court denied Petitioner's Motion for Class Certification in the companion case as, "ridiculous on its face." See Appendix C and D.

Originally, both the companion case and the instant case included a claim of "constructive discharge," as a result of Petitioner's alleged defense of black co-workers and customers. Ultimately, however, the companion case and the claim of constructive discharge were dismissed in October of 1980 upon Respondent's Motion for Summary Judgment. As a result, the instant case merely involves a claim of an unlawful failure to promote or transfer Petitioner, although its origins are of no small significance. However, to this day Petitioner continues to claim "constructive discharge." Petition, P. 3.

The companion case had significant impact on Petitioner's repeated efforts to secure class certification. As evidenced by the Court's various denials of class certification, the fact of the companion case and the instant case's competing claims demonstrated conclusively that Petitioner could not effectively represent a class composed of female employees. See Memorandum Opinion, Petition A19.

While somewhat obscure, there are two basic arguments advanced by Petitioner: (a) that a plaintiff need not demonstrate particularized acts of discrimination to prevail in an individual Title VII case; and (b) that mere allegations of across-the-board discriminatory conduct are sufficient to require class certification.

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## **REASONS FOR DENYING THE WRIT OF CERTIORARI**

While Petitioner purports to identify "five special and important reasons why the Writ should be granted," there are several fundamental reasons why the Writ cannot be granted.

### **1. There Is Overwhelming Evidence To Support The District Court's Conclusion That Petitioner Was Not The Object Of Discriminatory Treatment.**

The ultimate issue before the Court of Appeals and this Court is not the issue of a *prima facie* case. As the Court of Appeals recognized, this case is controlled by *United States Postal Serv. Bd. of Governors v. Aikens*, — U. S. —, 103 S. Ct. 1478 (1983). The ultimate issue to be reviewed after trial and upon Appeal is not whether Plaintiff established a *prima facie* case, rather, whether under all the circumstances the defendant intentionally discriminated against Petitioner. As in *Aikens*, Petitioner proceeded with all her proofs at trial. The matter was not dismissed as a result of a failure to establish a *prima facie* case. Rather, both the Magistrate and the District Court fully considered all the evidence at trial, including the proofs of Plaintiff and Defendant, and concluded that the Petitioner had failed to establish that she was treated differently as an employee as a result of her sex.

A review of the Magistrate's Report and Recommendation and the District Court's Order Granting Defendant's Motion for Entry of Judgment demonstrates that all the evidence was considered and, for purposes of dismissal, it was assumed that Plaintiff did demonstrate a *prima*

facie case. See Magistrate's Report and Recommendation, Petition A14. However, there simply was insufficient evidence that Petitioner was treated any differently than any other employee on the basis of her sex. The findings were well supported by the record and were not clearly erroneous. See *Pullman-Standard v. Swint*, 456 U.S. 273 (1982).

**2. Even If It Is An Appropriate Theory, There Was No Evidence Of A Pattern Or Practice Of Discrimination.**

Petitioner proceeds on the basis that a discriminatory pattern and practice were established. In fact, there was no evidence of any discriminatory pattern and practice. The Magistrate's Report and Recommendation and the Court's Order Granting Defendant's Motion for Entry of Judgment reflect Petitioner's failure to establish any discriminatory pattern and practice by Respondent. While repeatedly asserting that Respondent was guilty of generalized discriminatory treatment of females, there was virtually no evidence of it at trial. See Magistrate's Report and Recommendation, Petition A13. While selecting isolated statistical conclusions in its Statement of the Case, Petitioner ignores major segments of statistical evidence and the overwhelming testimony at trial.

**3. Petitioner Advances A Theory Specifically Rejected By This Court And Ignores Proof Of Individual Discrimination.**

Plaintiff's repeated reliance on its concept of a pattern or practice lawsuit is misguided and inconsistent with this Court's mandates. Petitioner erroneously asserts that Justice Stewart's Opinion in *International Brotherhood of*

*Teamsters v. United States*, 431 U.S. 324 (1977) recognized three separate causes of action in an individually maintained Title VII action; disparate treatment, disparate impact and pattern or practice. In fact, this Court reiterated that a private plaintiff has the right to proceed only on theories of disparate treatment or disparate impact. As this Court observed in *Teamsters*, *supra* at 360:

The plaintiff in a pattern-or-practice action is the Government, and its initial burden is to demonstrate that unlawful discrimination has been a regular procedure or policy followed by an employer. . .

Importantly, while observing that the articulated theories should not be mechanically applied, the Court observed that, at a minimum, an individual must:

. . . demonstrate at least that his rejection did not result from the two most common legitimate reasons on which an employer might rely to reject a job applicant: an absolute or relative lack of qualifications, or the absence of a vacancy in the job sought. *Id.* at fn. 44.

The Petitioner seems to argue that she should be allowed to proceed in the absence of any showing that she was, in any way, treated differently than any other employee and in complete disregard of this Court's decisions in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981). Here, Petitioner's claim and, indeed, her proofs at trial, amounted to nothing more than speculation, conjecture and unsupported assertions. At the conclusion of a full and complete hearing, the Magistrate and ultimately the District Court concluded that there was, in fact, no pattern or practice of discrimination against wom-

en in general, or against Petitioner in particular. Virtually all the credible facts presented at trial demonstrated that Petitioner was not the object of any discriminatory treatment, pattern or practice.

**4. Petitioner Cannot Ignore The Legal Prerequisites Of F. R. Civ. P. 23(a).**

Petitioner misstates and mischaracterizes the operating principals behind F. R. Civ. P. 23(a). This Court has repeatedly required an affirmative demonstration by the Petitioner of the various prerequisites articulated in Rule 23(a). The Petitioner simply ignores those prerequisites. See *General Telephone Co. of the Southwest v. Falcon*, 457 U. S. 147 (1982) and *General Telephone Co. of the Northwest Inc. v. EEOC*, 446 U. S. 318 at 330 (1980).

In *General Telephone Co. v. Falcon*, *supra*, this Court specifically rejected the so-called "across-the-board approach" advocated by Petitioner here. See also *East Texas Motor Freight System Inc. v. Rodriguez*, 431 U. S. 395 (1977). Petitioner advocates the abandonment of previous Supreme Court decisions and the adoption of a debunked theory which would allow a Plaintiff to proceed upon the mere allegation of an across-the-board pattern and practice of discrimination. Such a theory would allow a plaintiff to proceed in the absence of any particularized proof.

A plaintiff has a responsibility to make an affirmative demonstration that she shares the same interests and has suffered the same injury as the class members. The District Court had an obligation to carefully analyze the nature and type of claim and the particular factual char-

acteristics of Petitioner's employment in order to determine whether the necessary prerequisites had been satisfied. A district court must carefully evaluate the legitimacy of a plaintiff's claim because the class determination is "enmeshed in the factual and legal issues comprising the plaintiff's course of action." *General Telephone Co. v. Falcon*, *supra* at 160.

This Court has consistently rejected the concept that a class should be certified every time a plaintiff claims class wide discrimination. This Court has required that a plaintiff demonstrate her particularized interest and injury and their relationship to the purported class. The District Court properly exercised its discretion in evaluating the nature of Petitioner's claims and their relationship to the purported class claims and denied class certification. See Petition A19.

Of course, the District Court cannot pass on the merits of a claim in considering class certification, but it is required to consider the nature of the individual claim to determine the propriety of class certification. The Magistrate's Report and Recommendation confirm the appropriateness of the District Court's earlier denials of class certification.

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## CONCLUSION

In summary, the Petitioner's characterization of the facts of this case, the course of the litigation and the underlying case law is misguided and deceptive. This case is not unique, noteworthy, or novel. The case is routine and not the proper subject of this Court's time or attention.

The District Court properly considered the issue of class certification and determined that the Petitioner was not a proper class representative since she had failed to satisfy the necessary legal prerequisites. The District Court properly exercised its discretion and denied class certification. At the same time, at the conclusion of a complete hearing and consideration of evidence presented by both Petitioner and Respondent, the Magistrate's Report and Recommendation properly determined the ultimate issue of discrimination. The District Court, reviewing the facts and considering the Magistrate's Report and Recommendation, properly dismissed Petitioner's claim.

The Sixth Circuit's review of the issues was proper and fully supported by the record below. This Court should not allow the further abuse of the judicial system by the Petitioner. The Petition for Writ of Certiorari should be denied and the matter should be remanded to the Court below for an appropriate award of attorneys' fees and costs sustained as a result of this Petition and the Appeal to the 6th Circuit.

This Petition is obviously filed in bad faith and is unreasonable, frivolous and vexatious. 42 U.S.C. § 2000e5, *Roadway Express Inc. v. Piper*, 447 U.S. 752 (1980), and *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978). There is simply no factual basis for the appeal and the legal theories advanced by Petitioner have been rejected repeatedly by this Court. Respondent should be compensated fully for the needless expense associated with this matter.

Respectfully submitted,

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Dated: October 5, 1983.

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**APPENDIX A**

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

Civil Action No. 77-72204

Doris J. Affeldt  
5581 Grayton  
Detroit, Michigan 48224,

On behalf of herself and all  
others similarly situated,

Plaintiffs,

vs.

J. C. Penney  
18000 East Eight Mile Road  
Harper Woods, Michigan  
48225,

Defendant.

**COMPLAINT—CLASS ACTION**

(Filed September 14, 1977)

**JURISDICTION**

1. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §§ 1331, 1337, and 1343(4), and 28 U.S.C. §§ 2201 and 2202. This is a suit in equity authorized and instituted pursuant to Title VII of the Act of Congress known as the Civil Rights Act of 1964, 42 U.S.C. §§ 2000 (e) *et seq.* The jurisdiction of this Court is invoked to secure protection of and to redress deprivation of rights secured by 42 U.S.C. §§ 2000(e) *et seq.*, providing for injunctive and other relief against sex discrimination in employment.



2. Plaintiff, Doris J. Affeldt, timely filed her charge of employment discrimination on the bases of race and sex against the defendant with the Equal Employment Opportunity Commission on or about September 22, 1976. On or about June 30, 1977, plaintiff, Doris J. Affeldt, was advised by the Equal Employment Opportunity Commission of her right to initiate a civil action in the appropriate Federal District Court within ninety (90) days of the receipt of said letter.

### PARTIES

3. Plaintiff, Doris J. Affeldt, is a white female citizen of the United States and is a resident of Detroit in the State of Michigan. Ms. Affeldt was employed as a cashier-hostess in the restaurant at the J. C. Penney store in Harper Woods, Michigan from August 11, 1975, until her constructive discharge on or about September 1, 1976.

4. Defendant J. C. Penney, 18000 East Eight Mile Road, Harper Woods, Michigan 48225 is one of a nationwide chain of department stores operated by J. C. Penney, Inc. Defendant J. C. Penney store offers for sale to the public a large variety of household and automotive goods and appliances. Defendant J. C. Penney also maintains a restaurant on its premises.

J. C. Penney, 18000 East Eight Mile Road, Harper Woods, Michigan 48225 is an employer in an industry affecting commerce.

### CLASS ACTION ALLEGATIONS

5. This action is brought pursuant to Rule 23(a) and Rule 23(b) (2) of the Federal Rules of Civil Procedure.

6. The class which plaintiff represents is composed of all persons who were formerly employed, who are employed, and who might be employed by the defendant J. C. Penney Store, 18000 East [sic] Mile Road, Harper Woods, Michigan and who defend the black race and are discriminated against for taking such a position; in addition, the class is composed of all past black and female applicants and employees of the defendant and all future black and female applicants and employees of the defendant who have been, are, or will be unfairly treated because of the defendant's discriminatory employment practices.

7. The class is so numerous as to make it impractical to bring the class members individually before this Court. The exact size of the class is, at present, unknown. Discovery will reveal the exact number of past and present employees of the defendant who have been discriminated against for defending the black race, and also the precise number of past and present, black and female employees and applicants who have been treated unfairly by the defendant. The number of future employees who will defend the black race and the number of future black and female employees and applicants, although incapable of precise determination, is sizeable.

8. A class action is superior to other available methods for the fair and efficient adjudication of this controversy since the number of members of the class is large and individual adjudication would burden the Court, the individual plaintiffs, and the defendant.

9. There are common questions of law and fact concerning the defendant's single across-the-board policy of discrimination on the bases of race and sex. This policy

#### App. 4

encompasses the entire employment spectrum, including hiring and promotional practices, transfer and upgrading practices, job assignment practices, practices related to the enforcement of rules, discharge practices, layoff and recall practices, and practices related to pregnancy leave. Common relief is sought concerning all of these across-the-board practices of the defendant which affect plaintiff and all members of the class. See *Senter v. General Motors Corp.*, 532 F. 2d 511, 12 FEP Cases 451, 460-61 (6th Cir. 1976).

10. Plaintiff's claims are typical of those of the class because the plaintiff has alleged the existence of a single across-the-board policy of discrimination which affects the public interest and all members of the class as well as herself as an individual.

11. Plaintiff adequately represents the interests of the class and is unaware of any potential conflict with the interests of other members of the class since all members of the class have been, are, or will be subjected to the same discriminatory practices perpetrated by the defendant upon the named plaintiff. Plaintiff is represented by competent counsel who will vigorously pursue the litigation to its conclusion.

12. Defendant has acted or refused to act on grounds applicable to the class, thereby making appropriate common relief from said discriminatory policies and practices, including declaratory and injunctive relief for the class. See *Senter v. General Motors Corp.*, 532 F. 2d 511, 12 FEP Cases 451, 462 (6th Cir. 1976).

13. This Court is a desirable forum in which to concentrate the litigation of the claims of the class, since it

has power to hear all of the claims and to grant appropriate relief.

### CAUSE OF ACTION

14. Plaintiff, Doris J. Affeldt, was hired as a cashier-hostess in the restaurant maintained by the defendant J. C. Penney on or about August 11, 1975. Several months after plaintiff was hired, she expressed to the store personnel manager a desire to obtain a transfer or promotion to a more desirable and better paying job in another department. Plaintiff was abruptly informed by the store personnel manager that there was nothing else for her. On a subsequent occasion, having heard by word-of-mouth that there were openings in the cosmetic department, plaintiff approached the cosmetic department manager who later informed plaintiff that the store personnel manager did not even respond to her request. This is an example of the defendant's policy of concentrating and locking female employees into low paying, menial job classifications in certain departments and of not affording its female employees opportunity for advancement into better paying jobs and more desirable jobs and into supervisory, executive, and managerial ranks.

15. Shortly after plaintiff had actively sought out promotions and transfers with the defendant, the defendant commenced a severe campaign of harassment against plaintiff which resulted in plaintiff's constructive discharge on the basis of sex on or about September 1, 1976.

16. As a cashier-hostess at the defendant's restaurant in Harper Woods, Michigan, plaintiff's duties involved, among other things, seating customers in various areas of

the restaurant. In performing these and other duties, plaintiff became aware that many of the personnel policies and practices at the store were racially discriminatory. During the month of August, 1976, plaintiff encountered harassment from fellow employees who threatened to have her discharged for seating blacks in the wrong areas of the restaurant.

17. Several days after these threats were made, plaintiff was called into the personnel office and was threatened with discharge if she didn't "shape up." There followed a campaign of harassment against the plaintiff by the company. For example, the supervisors watched the plaintiff more closely than others and made frequent references to shortages in the cash register in her presence. This campaign of harassment resulted in plaintiff's constructive discharge. Because plaintiff chose to defend the rights of blacks to enjoy equal treatment, the plaintiff, herself, became a target of discrimination which ultimately resulted in her constructive discharge.

18. The defendant has pursued and continues to pursue policies and practices that discriminate against plaintiff, those who defend the rights of blacks, blacks and females in the following particulars:

- (a) Black employees, employees who defend the rights of blacks and female employees receive the least desirable work shifts.

- (b) The defendant has not appreciably added blacks and females to its employment rolls. Moreover, the defendant has not actively recruited potential black and female employees.

- (c) White male employees with less seniority are being promoted over blacks and females.

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(d) Black employees, employees who defend the rights of blacks, and female employees are graded lower on their performance sheets than are white males and this evaluation tool involves subjective standards rather than valid objective criteria. Because this evaluation tool has discriminatory effects, blacks, those who defend the rights of blacks, and females are denied promotions, merit increases, and better job assignments.

(e) Most blacks and females employed by the defendant are hired into menial, low paying job classifications in a few departments and are unable to advance to higher classifications or to transfer into departments which offer greater opportunity for advancement.

(f) The defendant's policies and practices are applied strictly where blacks, those who defend the rights of blacks, and females are concerned and with leniency and consideration where white males are concerned thus enabling white males to remain on the job and to receive promotions and other benefits not available to blacks, females, and those who defend the rights of blacks.

(g) Black employees, female employees, and white employees who have defended the rights of blacks have been intimidated, harassed, and verbally abused on the job by other employees and supervisors.

(h) There are very few blacks and females in managerial positions despite the fact that there are many black and female employees qualified for said positions.

(i) Black employees, white employees who defend the rights of blacks, and female employees do not receive proper job training.

(j) The defendant employs a seniority system which has a greater detrimental effect upon black and

female employees than it does upon white male employees.

(k) The defendant maintains a discriminatory pregnancy leave policy.

(l) The defendant discriminates against blacks and females in recruitment, hiring, transfer and promotional practices, layoff and recall practices, disciplinary and discharge practices as well as in all other employment practices.

19. The acts of the defendant J. C. Penney store in Harper Woods, Michigan with respect to the plaintiff and the class she represents constitute past, present, and continuing discrimination on the bases of race and sex in violation of 42 U. S. C. §§ 2000(e) *et seq.*

#### RELIEF

20. Plaintiff has no plain, adequate, or complete remedy at law to redress the wrongs alleged herein, and this suit is her only means of securing adequate relief for herself and the class she represents. Plaintiff and the class she represents are now suffering and will continue to suffer irreparable injury if no relief is granted against defendant's unlawful policies and practices as set forth herein.

WHEREFORE, Plaintiff respectfully prays:

21. That this Court assume jurisdiction of this cause and set it down promptly for hearing as a class action for injunctive and declaratory relief and damages.

22. That this Court advance this matter on its docket, order a speedy hearing at the earliest practicable date, and cause this case to be in every way expedited.

23. That this Court grant plaintiff and the class she represents a permanent injunction enjoining defendant from maintaining or continuing the policies and/or practices of denying, abridging, withholding, conditioning, and limiting or otherwise interfering with the rights of plaintiff and the class she represents as provided under 42 U. S. C. §§ 2000(e) *et seq.*

24. That the Court order the defendant to reinstate the plaintiff, Doris J. Affeldt, to the position she held prior to her constructive discharge on or about September 1, 1976, and to reimburse her in full for the salary and benefits she lost since September 1, 1976, to the date she is returned to the job.

25. That the Court grant a declaratory judgment that the policies and practices complained of herein violate 42 U. S. C. §§ 2000(e) *et seq.*

26. That the defendant be ordered to make payments to the plaintiff and the class she represents of a sum of money equal to the differential between pay received by the plaintiff and members of the class on their present jobs and the pay they would have received had they not been discriminated against because of their race and/or sex and/or because of their defense of the rights of members of the black race.

27. That the Court issue an order enjoining the defendant, its officers, agents, employees, and all persons in active concert and participation with them from engaging in any employment practice which is discriminatory on the bases of race and sex and specifically from:



(a) Maintaining an employment practice whereby black employees, employees who defend the rights of blacks and female employees receive the least desirable workshifts;

(b) Maintaining a practice whereby blacks and females are not hired in proportion to their numbers in the available work force;

(c) Maintaining a promotional practice whereby white male employees are promoted over and around black and female employees on the basis of intangible and subjective *indicia* not related to job performance;

(d) Utilizing performance evaluation sheets and other performance evaluation criteria which have not been shown to be and are not indicators of job performance;

(e) Maintaining a practice whereby blacks and females employed by the defendant are hired into menial, low-paying job classifications in a few departments and are unable to advance to higher classifications or to transfer into departments which offer greater opportunity for employment;

(f) Applying employment policies and practices in such a way that black employees, female employees, and employees who defend the rights of blacks are treated less favorably than white male employees who do not defend the rights of blacks;

(g) Maintaining a practice of failing to take appropriate action to prevent harassment of black employees, employees who defend the rights of blacks, and female employees;

(h) Maintaining a practice of systematically promoting white males into supervisory and management positions without promoting blacks and females;

(i) Maintaining a practice of failing to give black employees, female employees, and employees who defend the rights of blacks the proper job training;

(j) Continuing a seniority system which has a greater detrimental effect upon black and female employees than it does upon white male employees;

(k) Maintaining a pregnancy leave policy which is discriminatory on the basis of sex;

(l) Continuing an over all policy in recruitment, hiring, transfer and promotional practices, layoff and recall practices, disciplinary and discharge practices whereby blacks, those who defend the rights of blacks, and females are discriminated against in every facet of defendant's personnel practices from the lowest job classifications to managerial jobs.

28. That the defendant who has deliberately and willfully discriminated in employment against plaintiff and the class she represents in the face of clear and unequivocal guidelines by the Federal and State government over the past few years be ordered to pay punitive damages in the amount of Three Hundred Thousand Dollars (\$300,000.00).

29. That the Court allow the plaintiff her costs herein including reasonable attorney fees.

30. That the Court grant all other relief to which the plaintiff and the class she represents may appear to be entitled to assure compliance with all orders of the Court.

/s/ Robert J. Affeldt  
Attorney for the Plaintiffs  
Robert J. Affeldt, Inc., LPA  
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and,

/s/ Robert Morgan  
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(313) 478-7604 (No. P 24956)

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App. 12

## APPENDIX B

### IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN SOUTHERN DIVISION

Civil Action No. 672446

Doris J. Affeldt  
5581 Grayton  
Detroit, Michigan 48224

On behalf of herself and all others similarly  
situated,

Plaintiffs,

vs.

J. C. Penney  
18000 East Eight Mile Road  
Harper Woods, Michigan 48225,

Defendant.

Judge

### COMPLAINT - CLASS ACTION

(November 24, 1976)

### JURISDICTION

1. Jurisdiction of this Court is invoked pursuant to 28 U. S. C. § 1331, 1337, and 1343(4), and 28 U. S. C. § 2201 and 2202. This is a suit in equity authorized and instituted pursuant to 42 U. S. C. § 1981 known as the Civil Rights Act of 1866, 1870, and 1871, and providing for declaratory, injunctive and other relief against racial discrimination and providing rights of citizens and all other persons within the jurisdiction of the United States.

### PARTIES

2. Plaintiff, Doris J. Affeldt, is a white, female citizen of the United States and is a resident of Detroit in the State of Michigan. Ms. Affeldt was employed as a

cashier-hostess in the restaurant at the J. C. Penney store in Harper Woods, Michigan from August 11, 1975, until her constructive discharge on or about September 1, 1976.

3. Defendant J. C. Penney, 18000 East Eight Mile Road, Harper Woods, Michigan 48225 is one of a nationwide chain of department stores operated by J. C. Penney, Inc. Defendant J. C. Penney store offers for sale to the public a large variety of household and automotive goods and appliances. Defendant J. C. Penney also maintains a restaurant on its premises.

J. C. Penney, 18000 East Eight Miles Road, Harper Woods, Michigan 48225 is an employer in an industry affecting commerce.

#### CLASS ACTION ALLEGATIONS

4. This action is brought pursuant to Rule 23(a) and 23(b)(2) of the Federal Rules of Civil Procedure.

5. The class which the plaintiff represents is composed of all persons who were formerly employed, who are employed, and who might be employed by the defendant J. C. Penney Store, 18000 East Eight Mile Road, Harper Woods, Michigan, and who defend the black race and are discriminated against for taking such a position; in addition, the class is composed of all past black applicants and employees of the defendant, all present black applicants and employees of the defendant and all future applicants and employees of the defendant who have been, are, or will be unfairly treated because of the defendant's discriminatory personnel policies and practices.

6. The class is so numerous as to make it impracticable to bring the class members individually before this

Court. At the present time, the exact size of the class is unknown. Discovery procedures under the Federal Rules of Civil Procedure will reveal the exact number of past and present employees of the defendant who have been discriminated against for defending the black race, and also the precise number of past and present black applicants and employees who have been treated unfairly by the defendant. The number of future employees who will defend the black race and the number of future black employees and applicants, though incapable of exact determination, is sizeable.

7. A class action is superior to other available methods for the fair and efficient adjudication of this controversy since the number of members of the class is large and the individual adjudication of the claims of class members would burden the court, the individual plaintiffs, and the defendants. Moreover, the fact that this is a civil rights action based upon discrimination in employment on account of race makes it impracticable for class members to bring individual suits because of the cost and complexity of civil rights litigation and because of the danger of fragmentation of civil rights and class rights if conflicting results and settlements were reached.

8. There are common questions of law and fact concerning the defendant's single across the board policy of racial discrimination. This policy pervades the entire employment spectrum, including recruitment, hiring, transfer and promotional practices, disciplinary and discharge practices, as well as other personal practices. Common relief is sought concerning all of these across the board practices which affect the plaintiff and all members of the class.

9. Plaintiff's claims of discrimination and of the effects of discrimination resulting from the policies and practices of defendant are typical of the class she represents because the existence of a single across the board policy of discrimination affecting all members of the class, as well as plaintiff individually, has been alleged.

10. Plaintiff adequately represents the interests of the class and is unaware of any conflict or potential conflict between her interest and interests of the class. By its very nature, plaintiff's action requires class remedies because it is aimed at the elimination of discrimination toward a class made up of blacks and those who defend blacks. Plaintiff is represented by competent counsel who will vigorously pursue the litigation to its conclusion.

11. Defendant has acted or refused to act on grounds applicable to the class, thereby making appropriate common relief from said discriminatory policies and practices, including declaratory and injunctive relief for the class. See *Senter v. General Motors Corp.*, 532 F. 2d 511, 12 FEP Cases 451, 462 (6th Cir. 1976).

12. This Court is a desirable forum in which to concentrate the litigation of the claims, since it has power to hear all of the claims and to grant appropriate relief.

#### CAUSE OF ACTION

13. As a cashier-hostess at the J. C. Penney store restaurant in Harper Woods, Michigan, plaintiff's duties involved, among other things, seating customers in various areas of the restaurant. In performing these and other duties, plaintiff became aware that many of the personnel policies and practices at the store were racially discrimina-

tory. During the month of August, 1976, plaintiff encountered harassment from fellow employees who threatened to have her discharged for seating blacks in the wrong areas of the restaurant.

14. Several days after these threats were made, plaintiff was called into the personnel office and was threatened with discharge if she didn't "shape up". There followed a campaign of harassment against the plaintiff by the company. For example, the supervisors watched the plaintiff more closely than others and made frequent references to shortages in the cash register in her presence. This campaign of harassment resulted in plaintiff's constructive discharge. Because the plaintiff chose to defend the rights of blacks to enjoy equal treatment, the plaintiff, herself, became a target of discrimination which ultimately resulted in her constructive discharge.

15. The defendant has pursued and continues to pursue policies and practices that discriminate against plaintiff, those who defend the rights of blacks and all blacks in the following particulars:

- (a) Black employees and employees who defend the rights of blacks receive the least desirable work shifts.
- (b) Discrimination in promotional practices as evidenced by white employees with less seniority being promoted over blacks.
- (c) Plaintiff and the members of the class she represents are graded lower on their performance sheets than whites and this evaluation tool involves subjective standards rather than valid objective criteria. Because this evaluation tool has discriminatory effects, plaintiff and the class she

represents are denied promotions, merit increases, and better job assignments.

- (d) The defendant's policies and practices are applied strictly where blacks and those who defend the rights of blacks are concerned and with leniency and consideration where whites are concerned thus enabling whites to remain on the job, receive promotions, and other benefits not available to blacks and those who defend the rights of blacks.
- (e) The defendant has not appreciably added blacks to its employment rolls.
- (f) Most blacks employed by the defendant are hired as crew people and are unable to advance to higher classifications.
- (g) Black employees and white employees who have defended the rights of blacks have been intimidated, harassed, and verbally abused on the job by other employees and supervisors.
- (h) There are very few blacks in managerial positions with the defendant despite the fact that there are many black employees qualified for said positions.
- (i) Black employees and white employees who defend the rights of blacks do not receive proper job training.
- (j) The defendant employs a seniority system which has a greater detrimental effect upon black employees than it does upon white employees.
- (k) The defendant discriminates against blacks in recruitment, hiring, transfer, and promotional practices as well as other personnel practices.

16. The acts of the defendant J. C. Penney store in Harper Woods, Michigan with respect to the plaintiff and the class she represents constitute past, present, and continuing discrimination in employment on the basis of race in violation of 42 U. S. C. § 1981.



RELIEF

17. Plaintiff has no plain, adequate, or complete remedy at law to redress the wrongs alleged herein, and this suit is her only means of securing adequate relief for herself and the class she represents. Plaintiff and the class she represents are now suffering and will continue to suffer irreparable injury if no relief is granted against defendant's unlawful policies and practices as set forth herein.

WHEREFORE, Plaintiff respectfully prays:

18. That this court assume jurisdiction of this cause and set down promptly for hearing as a class action for injunctive and declaratory relief and damages.

19. That this court advance this matter on its docket, order a speedy hearing at the earliest practicable date, and cause this case to be in every way expedited.

20. That this court grant plaintiff and the class she represents a permanent injunction enjoining defendant from maintaining or continuing the policies and/or practices of denying, abridging, withholding, conditioning and limiting or otherwise interfering with the rights of plaintiff and the class she represents as provided under 42 U. S. C. § 1981.

21. That the court order the defendant to reinstate the plaintiff, Doris J. Affeldt, to the position she held prior to her constructive discharge on or about September 1, 1976, and to reimburse her in full for the salary and benefits she lost since September 1, 1976, to the date she is returned to the job.

22. That the court grant a declaratory judgment that the policies and practices complained of herein violate 42 U. S. C. § 1981.

23. That the defendant be ordered to make payments to the plaintiff and the class she represents of a sum of money equal to the differential between pay received by the plaintiff and members to the class on their present jobs and the pay they would have received had they not been discriminated against because of their race and because of their defense of the rights of members of the black race.

24. That the court issue an order enjoining defendants, its officers, agents, employees, successors, and all persons in active concert or participation with them from engaging in any racially discriminatory employment practice and specifically from:

- (a) Maintaining an employment practice whereby black employees and employees who defend the rights of blacks receive the least desirable work shifts;
- (b) Maintaining a promotional practice whereby white employees are promoted over and around black employees on the basis of intangible and subjective indicia not related to ability or job performance;
- (c) Utilizing performance evaluation sheets which have not been shown to be and are not indicators of job performance;
- (d) Applying employment practices and policies in such a way that black employees and employees who defend the rights of blacks are treated less favorably than white employees who do not openly defend the rights of blacks;

- (e) Maintaining a hiring practice whereby blacks are not hired in proportion to their numbers in the available work force;
- (f) Continuing a practice whereby blacks are hired primarily to work as crew people and are not given an opportunity to advance to higher classifications;
- (g) Maintaining a practice of failing to take appropriate action to prevent harassment of black employees and employees who defend the rights of blacks;
- (h) Maintaining a practice of systematically promoting whites into supervisory and management positions without promoting blacks and those who defend the rights of blacks who are qualified to do the job;
- (i) Maintaining a practice of failing to give black employees and other employees who defend the rights of blacks the proper job training;
- (j) Continuing a seniority system which has a greater detrimental effect upon black employees than it does upon white employees;
- (k) Continuing an over-all policy in hiring, recruitment, transfers and promotions whereby blacks and those who defend the rights of blacks and promotions whereby blacks are discriminated against in every facet of defendants' [sic] personnel practices from the lowest classifications to managerial jobs.

25. That the defendant who has deliberately and willfully discriminated in employment against plaintiff and the class she represents in the face of clear and unequivocal guidelines by the federal and state governments over the past few years be ordered to pay punitive damages in the amount of Three Hundred Thousand Dollars (\$300,000.00).

26. That the court allow the plaintiff her costs herein including reasonable attorney fees.

27. That this court grant all other relief to which the plaintiff and the class she represents may appear to be entitled to assure compliance with all orders of the court.

/s/ Robert J. Affeldt  
Attorney for the Plaintiffs  
5800 Monroe Street - Bldg. B.  
Sylvania, Ohio 43560  
(419) 885-1964

and

/s/ Robert Morgan  
Morgan & Morgan  
20793 Farmington Rd.  
Farmington, Mi. 48224  
(313) 478-7604 (No. P 24956)

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**APPENDIX C**

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

Civil No. 76-72446

DORIS J. AFFELDT,

Plaintiff,

vs.

J. C. PENNEY COMPANY,

Defendant.

ORDER DENYING MOTION  
FOR CLASS CERTIFICATION

At a session of said court held in the  
Federal Building and U.S. Courthouse,  
Detroit, Michigan, on January 13, 1978.

Present: Honorable James P. Churchill  
United States District Judge

On July 6, 1977, the plaintiff, a white woman who alleged that she was discharged from her employment at the defendant store because of her defense of blacks, filed this motion to certify a class consisting of past, present, and future and prospective black employees of the defendant and of employees who have been, are, or will be discriminated against because of their defense of blacks. This motion was joined for oral argument with a motion filed by the defendant on February 8, 1977, for an order that a class action not be maintained.

Oral argument was scheduled for January 6, 1978, at 11:30 A.M. Although the defendant appeared, the plaintiff did not. The Court denied oral argument and made a decision on the briefs.

The Court has concluded that the plaintiff's claims are not typical of the claims of the class she seeks to represent, that there are not questions of law or fact common to the class, and that the plaintiff cannot fairly and adequately represent the class she seeks to maintain. *McDonald v. Shawnee County Club, Inc.*, 438 F. 2d 632 (6th Cir. 1971); *Thomas v. Ford Motor Co.*, 396 F. Supp. 52 (E. D. Mi. 1973).

The plaintiff's motion for class certification is, therefore, DENIED.

/s/ James P. Churchill  
United States District Judge

BY /s/ illegible

ENTERED: January 17, 1978

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**APPENDIX D**

**UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION**

No. 76-72446

DORIS J. AFFELDT,

Plaintiff,

vs.

J. C. PENNEY,

Defendant.

Opinion of the Court re: Motion for Class Certification before Honorable James P. Churchill, United States District Judge, at Detroit, Michigan on Friday, January 6, 1978.

**APPEARANCES:**

No appearance on behalf of Plaintiff.

Ziegler, Dykhouse & Wise.

David J. Dykhouse, Esq.,

Robert A. Marsac, Esq.,

Appearing on behalf of Defendant.

Detroit, Michigan

Friday, January 6, 1978

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The Court: If I had read the pleading before scheduling it for oral argument I would have made a determination that it wasn't necessary, I could make a decision without oral argument. I think the more appropriate thing for the Court to do is to make a decision even though perhaps you might think it's unfair to you to make a decision

on this matter without oral argument, to cancel oral argument, which I do.

I deny the motion to certify a class as ridiculous on its face. There is no way this person can represent a class. They don't have a suggestion of the numerosity requirement. No way can her claim be typical of the other claims. She is a white person who wants to represent black people and she is not an appropriate class representative and, therefore, the motion for class certification will be denied and that disposes of any necessity of making any determination with respect to the defendant's motion. Doesn't that moot the defendant's motion?

Mr. Dykhous: Yes, I think it does, your Honor.

The Court: I want to make this clear on the record. I might have had oral argument had the parties both been here but I can't conceive any other way the decision could possibly be any other way. The law is against the plaintiff in this matter and, of course, I am not precluding the plaintiff's opportunity to file for, a motion for rehearing under our court rules.

Mr. Dykhous: Thank you, your Honor.

Do you want us to prepare an order.

The Court: No. I am doing this on the Court's own motion. I am just declaring it. I will prepare an order.

Mr. Dykhous: Thank you.